TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 112.

EDWARD E. RICHARD AND RALPH G. RICHARD, PARTNERS AS S. RICHARD & SONS, APPELLANTS,

vs.

THE CITY OF MOBILE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED OCTOBER 1, 1906.

(20,384.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1907.

1 *Caption.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of Alabama, Fifth Judicial Circuit, Mobile, Alabama.

A Transcript of the Record and Proceedings in said Court in Equity Case Number 248.

EDWARD E. RICHARD and RALPH G. RICHARD, Partners as S. Richard & Sons, Complainants,

versus

CITY OF MOBILE, a Municipal Corporation, Defendant.

Under an appeal sued out by the said S. Richard & Sons.

2 *Bill of Complaint.*

To the Honorable the Judges of the Circuit Court of the United States for the Southern Division of the Southern District of Alabama:

The bill of complaint of Edward E. Richard and Ralph G. Richard, partners doing business under the name and style of S. Richards & Sons, complainants, against the City of Mobile, a municipal corporation, respectfully shows unto your Honors as follows:

1st. That the complainants are residents and citizens of the City and County of Mobile, and State of Alabama, and are each over the age of twenty-one years.

That the defendant the City of Mobile, is a municipal corporation chartered by and situated within said State of Alabama and in the Southern Division of the Southern District of said State.

2nd. That the complainants are engaged in the business of wholesale liquor dealers in the City of Mobile, and as such they have paid their licenses for carrying on said business of wholesale liquor dealer due to the City as such, and to the State and County, and have likewise complied with the requirements of law so far as such requirements are imposed by the laws of the United States.

3rd. That as one part or feature of said wholesale liquor business the complainants are dealers in keg beer as wholesalers only, and under the following circumstances: That the complainants order beer by letters or telegrams sent from their place of business at Mobile, Alabama to a brewery or brewing company owned and conducted outside of the State of Alabama, and that the beer so ordered is shipped pursuant to such orders by continuous interstate transportation by said non-resident brewer or brewing company to the complainants at Mobile, Alabama in kegs, which kegs are without other packing loaded into railroad freight cars and transported by the transportation companies from said breweries in such

other states to complainants in Mobile, Alabama. That the
3 purchases of such beer by complainants are absolute and that by such purchase complainants become the owner thereof, to do with as they please; that they pay for the same usually after the arrival of such beer in Mobile; that the packages in which the beer comes are invariably the wooden kegs of the ordinary, usual and customary commercial sizes in which the same is packed for sale and shipment, and that the same is taken by complainants or their servants in the same usual commercial original packages from the cars of the railroad company upon the arrival thereof at Mobile, and are stored in the storehouse or warehouse of complainants in the City of Mobile until sold by complainants; that the complainants make sales of such beer in quantities of one keg or more to their various customers in and about the City of Mobile, and the vicinity thereof, and that all such sales are made in contemplation by complainants of delivery by them of said kegs as original packages, out of their said storehouse or warehouse in the City of Mobile, and that such deliveries thereof are made by delivery wagons to their customers in such original packages; that from the time of the packing and shipping of said beer at the brewery or breweries in states other than Alabama, until after the sale and delivery thereof by the complainants to their various customers in and about Mobile, and the vicinity thereof, none of said kegs ever become broken or opened until after the same are sold and delivered by complainants, and the deliveries by complainants pursuant to such sales by complainants are always and invariably in the same original, usual, commercial packages in which the same were packed and shipped from the brewery or breweries in said foreign states; that this mode of business has been conducted by the complainants ever since March 15th, 1904, and for some time prior thereto, and still continues, and that except as is hereinabove stated the complainants neither as brewery, firm, person, corporation, dealer, brewer, brewery agent or handler, has ever sold beer by the barrel, half barrel or quarter barrel in the City of Mobile, Alabama, since March 15th, 1904.

That the facts stated in this paragraph are well known to the Mayor and other officers in the City of Mobile, charged with the duty of collecting the revenue of said city.

4 4th. That said City of Mobile is not authorized by its charter to enact any police regulations concerning the business of wholesale beer dealers and said City has not enacted any police regulations regulating or attempting to regulate specially the business of wholesale liquor or beer dealers.

5th. That in the year 1904 and again in the year 1905, and again in the year 1906, said City of Mobile through the law making body thereof did enact a general revenue ordinance for each such year, imposing and assessing upon persons, firms and corporations doing business in the City of Mobile and upon a large number of classes of such persons, firms and corporations certain license taxes for carrying on such business in the city of Mobile, and that among said licenses so assessed for each such year are the following:

"*Wholesale Liquor Dealers.*—

Stock $2,000.00 and under	$75.00
Stock $2,001.00 to $3,000.00	100.00
Stock $3,001.00 and over	125.00

NOTE.—This clause does not include License for wholesale keg beer dealers, agents, brewers, breweries or handlers of wholesale keg beer."

As hereinabove alleged, complainants show that they have paid their licenses which they were required to pay under the subsection quoted in *in* this paragraph.

6th. That another paragraph or subsection of said general revenue ordinance was as follows:

"*Breweries.*—Each person, firm, corporation, dealer, brewer, brewery, agent or handler for a brewery, selling beer by the barrel, half barrel or quarter barrel, this clause not to include license for wholesale or retail vinous or spiritous liquors $200.00

That pursuant to the requirement in this paragraph mentioned said City of Mobile did demand of complainants for the year 1904, and again for the year, 1905, and again for the year 1906 a license tax of $200.00 for carrying on the business of a wholesale dealer in keg beer; that complainants are advised that under the facts hereinabove stated, the business of dealing in wholesale keg beer carried on by them is not taxable for revenue purposes by the State of Alabama or any municipal subdivision thereof, because the same is interstate commerce in original packages; that is to say, the
5 said beer is acquired by complainants through acts of interstate commerce pursuant to which and in the contemplation of which they are entitled to sell the same in original packages after the arrival thereof in the city of Mobile in the State of Alabama without the payment of license or privilege taxes for the privilege of dealing in such keg beer; that notwithstanding these facts the City of Mobile, the defendant herein, has demanded said license taxes of $200 for each of said three years, 1904, 1905, and 1906, and under a claim that complainants are committing a violation of said ordinance by refusing to pay said inequitable and unjust demand have caused the complainants to be arrested and brought before the Recorder of the City of Mobile, to be tried for an alleged violation of the city ordinance where, unless said City of Mobile is restrained, from further prosecution of said cause by this Honorable Court, these complainants may be subject to the infliction of a fine, or in default of the payment of such fine to imprisonment or sentenced for the performance of hard labor by said Recorder, the police magistrate of the City of Mobile.

7th. That the complainants have prepared at a large expense to themselves a large refrigerator or cooler for the storage and safe keeping in proper condition of said keg beer so imported from other states and dealt in by complainant, and have prepared other equip-

ment for the transaction of such business, which cooler and other equipment will be practically valueless to complainants if said business of wholesale dealers in keg beer is greatly interfered with or stopped as the result of said unjust prosecution for alleged violation of said ordinance.

That the profits derivable by complainants from said business are large, and constitute a material part of their business, and that the license taxes now claimed by the said City of Mobile, together with the value of said equipment and cooler greatly exceed, exclusive of interest and costs, the sum of $2000; and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum of two thousand dollars.

That it is provided further by said license ordinance so passed by the City of Mobile, that any person, firm or corporation
6 who shall engage in any business, trade or profession, or keep any establishment, or do any business or any act for which a license is required by the foregoing ordinance without having first obtained such license shall under conviction for each day of such business, trade or profession, or such establishment is kept or carried on, and for each act so done without such license be fined not less than one, nor more than one hundred dollars.

Complainants show that the license officer of the City of Mobile, who is the officer charged by law with the collection of the lawful revenues of said city, and who is the same officer who has caused the arrest of complainants before said Recorder as hereinabove stated, threatens that unless said license tax is so paid he will, as instructed by the Mayor of said city, continue to repeat the arrest of complainants until said unjust demand shall be complied with, and that if this threat is performed the complainants will be caused large expense for counsel fees in their defense, and great annoyance and trouble in and about the carrying on of said business, and probable loss of incomes and profits therefrom in a large amount, for which injuries they could get no adequate remedy at law.

That in addition to that, the city authorities of the City of Mobile are threatening to institute suit at law for the collection of said license taxes so demanded, and to levy upon the property of complainants for the satisfaction of said demand.

Inasmuch as complainants are without remedy save in this Honorable Court, they pray that the City of Mobile, a municipal corporation, may be made party defendant hereto, and that process may be issued in accordance with the usual practice of this Honorable Court, commanding them to plead, answer or demur to this bill of complaint within the usual time and under the usual penalties.

Prayer for Relief.

Complainants pray that upon the hearing of this cause your Honors will be pleased to order and decree that the complainants are not liable for said license tax so unjustly demanded of com-
7 plainants, and that the City of Mobile, its officers, agents and servants may be forever enjoined and restrained from insti-

tuting proceedings at law or otherwise for the purpose of attempting the collection of said license tax, and that pending the hearing of this cause your Honors will be pleased to grant a temporary injunction enjoining and restraining the same things temporarily until the cause can be heard on its merits and such injunction be made perpetual.

Complainants pray for such other or further relief as they may be entitled to and as to equity seems meet.

R. W. STOUTZ,
Solicitor for Complainants.

FOOT NOTE.—The defendant will answer each allegation of the foregoing bill of complaint contained in paragraphs one to seven both inclusive, but not under oath—answer under oath being expressly waived.

R. W. STOUTZ,
Solicitor for Complainants.

STATE OF ALABAMA, *Mobile County:*

Before me the undersigned authority personally appeared E. E. Richard who being duly sworn deposes and says that the allegations contained in the foregoing bill of complaint are true.

E. E. RICHARD.

Subscribed and sworn to before me this 13th day of June, A. D. 1906.

A. M. TUNNELL,
Notary Public, Mobile County, Ala.

Filed June 13, 1906.

RICHARD JONES, *Clerk.*

Motion for Injunction.

In the United States Circuit Court for the Southern Division of the Southern District of Alabama.

S. RICHARD & SONS
vs.
CITY OF MOBILE.

8 Come the complainants, S. Richard & Sons and move this Honorable Court to issue a temporary writ of injunction against the City of Mobile, restraining the said City of Mobile, its officers and agents from instituting proceedings at law or otherwise, for the purpose of attempting the collection of the license tax described in the bill.

R. W. STOUTZ,
Solicitor for Complainants.

To B. B. Boone, Sol. for Defendant:

Take notice that the above application is set for hearing June 26, 1906, at 10 o'clock A. M.

RICHARD JONES, *Clerk.*

Service of above accepted and copy of motion received this June 13, 1906.

B. B. BOONE,
Solicitor for Defendant.

Filed June 13, 1906.

RICHARD JONES, *Clerk.*

Demurrers to Bill.

In the Circuit Court of the United States for the Southern District of Alabama, at Mobile.

S. RICHARD & SONS
vs.
THE CITY OF MOBILE.

And now comes the defendant and demurs to the bill filed against it in this cause and for ground of demurrer assigns the following:

1. Because the facts stated in the bill show that the business being transacted by the complainants is not inter-state commerce and the defendant is not prohibited by the Constitution of the United States from requiring the payment to it of a license tax by complainants for engaging in said business.

B. B. BOONE,
City Attorney, for Defendant.

Filed June 26, 1906.

RICHARD JONES, *Clerk.*

9 *Motion to Dismiss Bill for Want of Equity.*

In the Circuit Court of the United States for the Southern District of Alabama, at Mobile.

S. RICHARD & SONS
vs.
THE CITY OF MOBILE.

And now comes the defendant and moves the Court to dismiss the bill filed against it in this cause for want of equity.

B. B. BOONE,
City Attorney, for Defendant.

Filed June 26, 1906.

RICHARD JONES, *Clerk.*

Opinion.

Circuit Court of the United States for the Southern District of Alabama.

No. 248. In Equity.

S. RICHARD & SONS
vs.
THE CITY OF MOBILE.

Richard W. Stoutz, Esqr., for Complainant.
B. B. Boone, Esqr., City Attorney, for Defendant.

TOULMIN, *District Judge:*

The complainants challenge the validity of the ordinance enacted by the Council of the City of Mobile imposing a license tax on dealers in beer. They decline to take a license from the City or to pay the annual license fixed by such ordinance, and they file this bill praying that the City and its officers be enjoined and restrained from enforcing it.

The bill charges that the ordinance is invalid as against the complainants, and that the City is without authority to enforce such ordinance against them because it conflicts with the interstate commerce clause of the Constitution of the United States; that the said ordinance seeks only to raise revenue and not to regulate the complainants' business; and that it imposes a tax for revenue, and is not passed in the exercise of the *of the* police power of the City.

As I view the case made by the bill, it is conceded that, under the decisions of the Supreme Court, prior to August 8th, 1890, when the Wilson Act was enacted, (26th Statutes U. S. 313) the contention of complainants would be sustained. That Court decided that a State statute prohibiting the sale of intoxicating liquors, except for designated purposes or under a license, was, as applied to a sale by an importer in the original packages of liquors manufactured and brought in from another state, in violation of the Interstate Commerce clause of the Constitution of the United States.

Leisy *vs.* Harding, 135 U. S., 100;
Ling *vs.* Mich., 135 U. S., 161.

The rule then was that an importer of intoxicating liquors into any state from any other state could by himself or agents, sell such liquors, so long as they remain in the unbroken packages in which they existed during their transportation, without regard to the laws of the state into which such liquors were imported. In the case of Vance *vs.* Vander-Cook Co., 170 U. S., 438, the Supreme Court said: "The settled doctrine is that the power to ship merchandise from one state into another carries with it as an incident the right in the receiver of the goods to sell them in the original packages, any state

regulation to the contrary notwithstanding. * * * The proposition, however, while generically true, is no longer applicable to intoxicating liquors since Congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to the lawful state regulations. A state law which provides equal regulations for the inspection and *sale* of domestic and imported liquors is valid as a lawful exercise of the police power.

Scott *vs.* Donald, 165 U. S., 58;
Minn. Brew'g Co. *vs.* McGillivray, 104 Fed., 258.

11 The plain purpose of the Act of Congress referred to was to allow state regulations to operate upon the sale of original packages of intoxicants coming from other states. It permits the state laws to attach to and control the sale in case the states absolutely forbid the sale of liquor, and it applies as well in case the states determine to restrict or regulate the same.

Vance *vs.* Vander-Cook Co., *supra.*

The Wilson law permits the police laws of a state to be applied to liquors which have been shipped into such state as an article of Interstate Commerce after such liquors have reached the end of the shipment and have been delivered to the consignee.

In re Bergen, 115 Fed. 340;
Rhodes *vs.* Iowa, 170 U. S. 412.

I take it that since that act it is not disputed that, if the ordinance in question was enacted in the exercise of the police power of the City of Mobile, it would not be in conflict with the Interstate Commerce provision of the Constitution.

But it is claimed that the said ordinance was passed not for the purpose of regulation but of revenue.

If revenue only was designed, it was not a police regulation. "It is doubtless true," say the authorities, "that the legislation must have reference to the supervision, control or regulation of some act or thing which may, in some way, injuriously effect the peace, good order, health, morality or safety of society."

Duluth Brew'g & Malt Co. *vs.* The City of Superior, 123 Fed. 356;
Pabst Brew'g Co. *vs.* City of Terre Haute, 98 Fed. 330.

"As a measure of police regulation, looking to the preservation of public morals, a state law prohibiting the manufacture and *sale* of intoxicating liquors is not repugnant to any clause in the Constitution of the United States."

Bartmeyer *vs.* Iowa, 18 Wall. 133;
Beer Co. *vs.* Mass., 97 U. S. 33;
Van Hook *vs.* City of Selma, 70 Ala. 363.

"Since the Wilson Act, liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature." *In re* Rahmer, 140 U. S. 545.

12 That act, in effect, provides that such merchandise when transported from one state to another shall lose its character as Interstate Commerce upon the completion of delivery under the contract of Interstate shipment, and before sale in the original packages.

Adams Exp. Co. *vs.* Iowa, 196 U. S. 142;
17 A. & E. Eny. of Law (2nd Ed.) 294.

"The purpose of the Act referred to was to make liquor after its arrival a domestic product and to confer power upon the state to deal with it accordingly."

Pabst Brew'g Co. *vs.* Crenshaw, 198 U. S. 17, 27.

"The manifest purpose of the act was to subject original packages to the regulation and restraint imposed by the state laws."

Pabst Brew'g Co. *vs.* Crenshaw, *supra;*
Vance *vs.* Vander-Cook Co., *supra.*

"The police laws of a state do not attach to the liquors brought from another state while in transit nor until the receipt and delivery to the consignee or receiver. From the moment of such receipt or delivery such liquors fall within the police power of the state in the same manner and to the same extent as like liquors of domestic manufacture."

Pabst Brew'g Co. *vs.* City of Terre Haute, *Supra.*

"The control by appropriate regulations from the time of their delivery belongs to the state as though they were of domestic manufacture. The state possesses plenary power to regulate and control the sale of intoxicating liquors within its territorial limits."

Pabst Brew'g Co. *vs.* Terre Haute, *supra;*
Van Hook *vs.* Selma, *supra.*

There can be no doubt that, upon its arrival in this City and delivery to the complainants, the beer purchased by them out of this State was subject to the operation and effect of any ordinance of the City enacted in the exercise of its police powers.

The question then is whether the ordinance imposing the license in question in this case was enacted as a police regulation in the exercise of the police powers of the City, or under its power of taxation.

"A city, when authorized by its charter, may impose license and business taxes upon natural persons and corporations."

13 21 A. & E. Encye. of Law (2nd Ed.) 782;
Kentz *vs.* Mobile, 120 Ala. 623.

The City of Mobile is authorized by its charter to assess and collect from all persons and corporations, trading or carrying on any business or trade in the City, a license tax.

Charter of Mobile, Sec. 43.

"A very usual method of exercising the police power in the regulation of business enterprises is by the requiring of licenses for engaging in certain lines of business."

22 A. & E. Encyc. of Law (2nd Ed.) 935;
Humes *vs.* City of Ft. Smith, 93 Fed. 857.

"License laws are regarded as police regulations."

Toll *vs.* Hudson, 78 Mo. 302;
Pabst Brew'g.Co. *vs.* Crenshaw, 120 Fed. 144.
City of Little Rock *vs.* Barton, 33 Ark. 443.
State *vs.* Ludington, 33 Wis. 107.

"The power to license should be used only for regulation."

Laundry License Cases, 22 Fed. 701;
Van Hook *vs.* Selma, *supra.*

The right here conferred is authority to license and the power for the purpose of revenue is not thereby inferred. "It is indeed excluded by the clearest implication."

Van Hook *vs.* Selma, *supra.*

In the case of the Pabst Brewing Co. *vs.* Terre Haute, 98 Fed. *supra,* cited by complainant's counsel, the court held that the law authorizing the imposition of the license in question in that case was not an exercise of the police power of the state but was purely a revenue measure enacted in the exercise of the power of taxation. The Court in its reasoning to sustain its ruling said, among other things, "The ordinance in question contains no provision for any control or regulation of the business of handling, storing or selling beer, and contains no reference to the maintenance of good order or safety of society." "In other words, it seeks simply to make the depot or agency pay a tax for the general revenue of the City without any attempt to control or regulate either the custody or sale of beer."

The ordinance under consideration in that case is very unlike the one here in question. The ordinance we are considering by
14 authority of law, imposes a license for carrying on the business of selling beer which, in effect, must more or less control or restrain its sale. As suggested by the court in Duluth Brew'g Co. *vs.* the City of Superior, *supra;* Bartmeyer *vs.* Iowa, *supra;* and Beer Co. *vs.* Mass. *supra,* such business is one which, looking to the preservation of public morals, good order, and the safety of society, should be regulated.

If the City of Mobile, under legislative authority, might prohibit outright the sale of liquor because detrimental to public interests or against public morals, as to which there can be no two opinions the manner of dealing with it is a matter solely addressed to the legislature. It is a subject-matter peculiarly within the province of the state.

Unless it clearly appears upon the face of the ordinance that the purpose of it was to exact a tax and not to impose a license for regu-

lation, the court should sustain it as being within the police power of the City. If there exists any doubt upon the question it should be resolved in favor of the law being within the police power.

Duluth Brew. Co. *vs.* City of Superior, *supra;*
Minn. *vs.* McGillivray, *supra.*

I may add that, irrespective of the Wilson Act and the question of police regulations hereinabove discussed, I am of the opinion that the rule announced in the case of American Steel & Wire Co. *vs.* Speed, 192 U. S. 500, would require a decision here in favor of the City of Mobile. The court there holds that goods brought from another state and not from a foreign country are subject to state taxation after reaching their destination and whilst held in the state for sale in the original packages.

Kehrer *vs.* Stewart, 197 U. S. 60.

My conclusion is that the motion for an injunction as prayed for should be, and it is hereby denied, and that the demurrer to the bill should be sustained, and motion to dismiss bill granted. Let a decree be entered accordingly.

Filed July 5, 1906.

RICHARD JONES, *Clerk.*

15 *Decree.*

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 248.

S. Richard & Son
vs.
The City of Mobile.

This cause coming on to be heard on the bill of complaint, mortion for injunction, demurrers to bill and motion to dismiss bill for want of equity; and was argued by counsel and submitted thereon for decree, and having been duly considered by the court: it is ordered, adjudged and decreed by the court that the motion for injunction be and the same is hereby denied; that the demurrers to the bill be and the same are hereby sustained, and that the motion to dismiss the bill for want of equity be and the same is hereby sustained and that the bill be and is hereby dismissed; and that the complainant be and is hereby taxed with the costs of the cause.

Made this July 5th A. D. 1906.

HARRY T. TOULMIN, *Judge.*

Filed and entered July 5, 1906.

RICHARD JONES, *Clerk.*

Assignment of Errors.

Circuit Court of the United States for the Southern Division of the Southern District of Alabama.

In Equity. No. 248.

EDWARD E. RICHARD and RALPH G. RICHARD, Partners as S. Richards & Sons, Complainants,

vs.

CITY OF MOBILE, a Municipal Corporation, Defendant.

And now on this 22 day of August, 1906 come the said complainants by R. W. Stoutz, their solicitor, and say that the decree rendered herein on July 5, 1906, is erroneous and against the just rights of said complainants for the following reasons:

16 1. The said circuit court of the United States erred in sustaining the demurrer of the defendant to the bill of complaint.

2. Because said United States Circuit Court erred in sustaining the first ground of demurrer to the bill of complaint holding that the business being transacted by the complainants is not interstate commerce and the defendant is not prohibited by the Constitution of the United States from requiring the payment to it of a license tax by complainants for engaging in said business.

3. The said United States Circuit Court erred in dismissing the bill of complaint of complainant out of said United States Circuit Court.

4. Because said United States Circuit Court erred in rendering a decree in behalf of the defendant and against the complainants in this cause.

Wherefore the complainants pray that said decree may be reversed and that said United States Circuit Court for the Southern Division of the Southern District of Alabama may be directed to enter a decree in accordance with the prayer of the bill.

R. W. STOUTZ,
Solicitor for Complainant.

Filed Aug. 22, 1906.

RICHARD JONES, *Clerk.*

Petition for Appeal.

The Circuit Court of the United States for the Southern Division of the Southern District of Alabama.

In Equity. No. 248.

EDWARD E. RICHARD and RALPH G. RICHARD, Partners as S. Richard & Sons, Complainants,
vs.
CITY OF MOBILE, a Municipal Corporation, Defendant.

The above named complainants, conceiving themselves ag-rieved by the decree made and entered on the 5th day of July, 1906 in the above entitled cause, does hereby appeal from said order
17 and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

R. W. STOUTZ,
Solicitor for Complainant.

Filed Aug. 22, 1906.
RICHARD JONES, *Clerk.*

Order Allowing Appeal, etc,

Circuit Court of the United States for the Southern District of Alabama.

In Equity. No. 248.

S. RICHARD & SONS
vs.
THE CITY OF MOBILE.

It appearing to the Court that the complainant, S. Richard & Sons have filed herein assignment of errors and petition praying an appeal to the Supreme Court of the United States from the decree rendered herein on July 5th, 1906, a day of the present May Term, denying to complainant a writ of injunction, sustaining demurrers to the bill, and dismissing the bill for want of equity, it is ordered by the Court that said appeal be and is hereby allowed upon the complainant executing and filing herein a bond in the sum of Two hundred and fifty dollars ($250.00) conditioned and payable as required by the rules of the Supreme Court, said bond to be approved by the Court.

This August 22, A. D. 1906.

HARRY T. TOULMIN, *Judge.*

Filed and entered Aug. 22, 1906.
RICHARD JONES, *Clerk.*

Appeal Bond.

Circuit Court of the United States for the Southern Division
18 of the Southern District of Alabama.

In Equity. No. 248.

EDWARD E. RICHARD and RALPH G. RICHARD, Partners as S. Richard & Sons, Complainants,
vs.
CITY OF MOBILE, a Municipal Corporation, Defendant.

Known all men by these presents, That we, Edward E. Richard and Ralph G. Richard, partners as S. Richard & Sons, as principals, and Ferdinand Meyer and Joseph Jossen as sureties, are held and firmly bound unto the defendant, City of Mobile, a municipal corporation, in the sum of Two hundred and fifty & 00/Dollars to be paid to the said defendant, City of Mobile, its certain attorneys, successors or assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this the 22nd day of August, A. D. 1906.

Whereas, at the May Term, 1906, of the Circuit Court of the United States for the Southern Division of the Southern District of Alabama in a suit depending in said court, wherein the principals hereinabove named are complainants and the City of Mobile, a municipal corporation is defendant, a decree was rendered on July 5, 1906, against the said complainants and in favor of said defendant, and the said complainants have obtained an appeal to the Supreme Court of the United States from said decree;

Now, therefore, the condition of the above obligation is such that if said complaints as appellants shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then the above *og*ligation to be void—else to be and remain in full force and virtue.

E. E. RICHARD. [SEAL.]
R. G. RICHARD. [SEAL.]
FERDINAND MEYER. [SEAL.]
JOSEPH JOSSEN. [SEAL.]

Signed, sealed and delivered in presence of
GEO. W. THREEFOOT.
J. G. PICKER.

19 Approved this 22nd day of August A. D. 1906.
HARRY T. TOULMIN, *Judge.*

Filed August 22nd, A. D. 1906.
RICHARD JONES, *Clerk.*

Citation.

UNITED STATES OF AMERICA:

The President of the United States of America to the City of Mobile, a municipal corporation, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, D. C. within thirty days from the date hereof pursuant to an appeal allowed by the Circuit Court of the United States for the Southern District of Alabama, in equity cause No. 248 S. Richard & Sons, complainant, *versus* The City of Mobile, a municipal corporation, defendant, wherein said S. Richard & Sons are appellants and you said City of Mobile are appellee, to show cause, if any there be, why the decree mentioned in said appeal should not be corrected and speedy justice done to the parties aforesaid in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this the 22nd day of August A. D. 1906.

HARRY T. TOULMIN,
U. S. District Judge for the Southern District of Alabama, Presiding in U. S. Circuit Court for said District.

Attest:

RICHARD JONES,
Clerk U. S. Circuit Court for the Southern District of Alabama.

Service of this citation is hereby accepted and copy thereof received this August 22nd. A. D. 1906.

B. B. BOONE,
Solicitor for City of Mobile.

Filed this the 22nd day of August A. D. 1906.
RICHARD JONES, *Clerk.*

20 *Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Southern District of Alabama.

I, Richard Jones, Clerk of said court do hereby certify that the foregoing nineteen (19) pages contain a true and correct transcript of the record and proceedings in this court in the Equity Cause Number 248, wherein S. Richard & Sons are complainants and the City of Mobile, a municipal corporation is defendant, as the same remains of record and file in my office as such clerk. Same being made up pursuant to an appeal sued out by said complainant.

Witness My hand and seal of said court at the city of Mobile, Alabama, this the 31st day of August A. D. 1906.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICHARD JONES, *Clerk.*

Endorsed on cover: File No. 20,384. S. Alabama, C. C. U. S. Term No. 112. Edward E. Richard and Ralph G. Richard, partners as S. Richard & Sons, appellants, *vs.* The City of Mobile. Filed October 1, 1906. File No. 20,384.

Office Supreme Court, U. S.
FILED
DEC 30 1907
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 112.

EDWARD E. RICHARD AND RALPH G. RICHARD, PARTNERS AS S. RICHARD & SONS, APPELLANTS.

VS.

THE CITY OF MOBILE, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLANTS.

RICHARD WM. STOUTZ, SOLICITOR FOR APPELLANTS.

STATEMENT OF THE CASE.

The question involved in this case is the validity of a municipal license ordinance imposing a tax on appellants for carrying on a business shown by the bill of complaint.

This cause was started by the appellants filing their bill on the equity side of the Court below seeking an injunction against the appellee City of Mobile.

The bill alleged among other things as follows:

2nd. That the complainants are engaged in the business of wholesale liquor dealers in the City of Mobile, and as such they have paid their license for carrying on said business for carrying on said business of wholesale liquor dealer due to the City on such, and to the State and County, and have likewise complied with the requirements of law so far as such requirements are imposed by the laws of the United States.

3rd. That as one part or feature of said wholesale liquor business the complainants are dealers in keg beer as wholesalers only, and under the following circumstances: That the complainants order beer by letters or telegrams sent from their place of business at Mobile, Alabama, to a brewery or brewing company owned and conducted outside of the State of Alabama, and that the beer so ordered is shipped pursuant to such orders by continuous interstate transportation by said non-resident brewer or brewing company to the complainants at Mobile, Alabama, in kegs, which kegs are without other packing loaded into railroad freight cars and transported by the transportation companies from said breweries in such other States to complainants in Mobile, Alabama. That the purchases of such beer by complainants are absolute and that by such purchase complainants become the owner thereof, to do with as they please; that they pay for the same usually after the arrival of such beer in Mobile; that the packages in which the beer comes are invariably the wooden kegs of the ordinary, usual and customary commercial sizes in which the same is packed for sale and shipment, and that the same is taken by complainants or their servants in the same usual commercial original packages from the cars of the railroad company upon the arrival thereof at Mobile, and are stored in the store house or warehouse of complainants in the City of Mobile until sold by complainants; that the complainants make sales of such beer in quantities of one keg or more to their various customers in and about the City of Mobile, and the vicinity thereof, and that all such sales are made in contemplation by complainants of delivery by them of said kegs as original packages, out of their said store house or warehouse in the City of Mobile, and that such deliveries thereof are made

by delivery wagons to their customers in such original packages; that from the time of the packing and shipping of said beer at the brewery or breweries in States other than Alabama, until after the sale and delivery thereof by the complainants to their various customers in and about Mobile, and the vicinity thereof, none of said kegs ever become broken or opened until after the same are sold and delivered by complainants, and the deliveries by complainants pursuant to such sales by complainants are always and invariably in the same original, usual, commercial packages in which the same were packed and shipped from the brewery or breweries in said foreign States; that this mode of business has been conducted by the complainants ever since March 15th, 1904, and for some time prior thereto, and still continues, and that except as is hereinabove stated the complainants neither as brewery, firm, person, corporation, dealer, brewer, brewery agent or handler, has ever sold beer by the barrel, half barrel or quarter barrel in the City of Mobile, Alabama, since March 15th, 1904.

That the facts stated in this paragraph are well known to the Mayor and other officers in the City of Mobile, charged with the duty of collecting the revenue of said city.

4th. That said City of Mobile is not authorized by its charter to enact any police regulations concerning the business of wholesale beer dealers and said City has not enacted any police regulations regulating or attempting to regulate specially the business of wholesale liquor or beer dealers.

Record pages 1 and 2.

The bill of complaint further alleged that in the years of 1904, 1905 and 1906 the appellee City enacted a general *revenue* ordinance, imposing license taxes on occupations, containing the following sub-sections or paragraphs:

"Wholesale Liquor Dealers—

Stock $2.000.00 and under .....$ 75.00
Stock $2.001.00 to $3,000.00..... 100.00
Stock $3,001.00 and over..... 125.00

Note.—This clause does not include license for wholesale keg beer dealers, agents, brewers, breweries or handlers of wholesale keg beer."

"Breweries.—Each person, firm, corporation, dealer, brewer, brewery, agent or handler for a brewery, selling beer by the barrel, half barrel or quarter barrel, this clause not to include license for wholesale or retail vinous or spiritous liquors .....$200.00."

Record pages 2 and 3.

The bill further alleged the making of demands for payment of such taxes of $200.00 and the refusal thereof and that appellee City caused appellants to be arrested therefor and have threatened to repeatedly cause their arrest for

the same illegal demand; that appellants have a large and costly equipment of property for use in said beer business that will become valueless if the business is greatly interferred with as the result of repeated prosecutions and that the property loss in profits will be large. The allegations show danger to property rights and probable loss of an amount exceeding $2,000.00 exclusive of interest and costs, and therefore sufficient to invoke the jurisdiction of the Court to grant injunctive relief, and the bill prays an injunction restraining appellee City from attempting the collection of said license tax, and for general relief.

Record pages 3 and 4.

The bill was verified by oath and appellants moved the Court for temporary injunction.

Record page 5.

The appellee City, by counsel, moved to dismiss the bill for want of equity and also demurred to the bill on a single ground, as follows:

"Because the facts stated in the bill show that the business being transacted by the complainants is not interstate commerce and the defendant is not prohibited by the Constitution of the United States from requiring the payment to it of a license tax by complainants for engaging in said business."

Record page 6.

The Court rendered a decree sustaining the demurrer and the motion to dismiss.

Record page 11.

Whereupon appellants (complainants below) appealed to this Court.

The errors assigned and relied on are as follows:

And now on this 22d day of August, 1906, came the said complainants by R. W. Stoutz, their solicitor, and say that the decree rendered herein on July 5, 1906, is erroneous and against the just rights of said complainants for the following reasons:

1. The said Circuit Court of the United States erred in sustaining the demurrer of the defendant to the bill of complaint.

2. Because said United States Circuit Court erred in sustaining the first ground of demurrer to the bill of complaint holding that the business being transacted by the complainants is not interstate commerce and the defendant is not prohibited by the Constitution of the United States from requiring the payment to it of a license tax by complainants for engaging in said business.

3. The said United States Circuit Court erred in dismissing the bill of complaint of complainant out of said United States Circuit Court.

4. Because said United States Circuit Court erred in rendering a decree in behalf of the defendant and against the complainants in this cause.

Wherefore the complainants pray that said degree may be reversed and said United States Circuit Court for the Southern Division of the Southern District of Alabama may be directed to enter a decree in accordance with the prayer of the bill.

R. W. STOUTZ,
Solicitor for Complainants.

Record page 12.

This case and case No. 113 entitled Phillips vs. City of Mobile, in error to Supreme Court of Alabama, are based upon identical principles, and though presented to this Court differently, are identical in the underlying facts, and no good reason exists why they should not be decided together.

ARGUMENT.

Equity has jurisdiction to, and will, enjoin a municipal corporation from taking proceedings to enforce collection of a license ordinance under the circumstances set up in the bill of complaint in this cause.

City of Hutchison vs. Beckham, 118 Fed., 399 (C. C. A. 8th Cir.)
Pabst Brewing Co. vs. Crenshaw, 198 U. S., 17; S. C., 120 Fed., 144;
Pabst Brewing Co. vs. Terre Haute, 98 Fed., 330;
Minn. Brewing Co. vs. McGillivray, 104 Fed., 258; 270;

This principle, so abundantly supported by authority, was not challenged and is virtually upheld by the Court below, when it said:

"As I view the case made by the bill, it is conceded that, under the decisions of the Supreme Court, prior to August 8th, 1890, when the Wilson Act was enacted (26th Statutes U. S. 313) the contention of complainants would be sustained."

Record page 7.

As the demurrer and motion to dismiss admitted the allegations of the bill, the decision turned upon the constitutionality of the license tax under the facts shown by the bill.

The learned Federal Judge who rendered the decree below held the license ordinance to be an exercise of the police

power and sustained it as such, (Record pages 9-11), notwithstanding the allegation in the bill, admitted by the demurrer,

"That said City of Mobile is not authorized by its charter to enact any police regulations concerning the business of wholesale beer dealers and said City has not enacted any police regulations regulating or attempting to regulate specially the business of wholesale liquor or beer dealers."

Record page 2.

It will be shown later in this brief that the City of Mobile did not possess any such power; nor has any State Court ever decided that it had such power or that such laws were enacted in the exercise of the police power.

The learned Judge below construes the case of Pabst Brewing Co. vs. Terre Haute, 98 Fed., 330, and seems to agree with the Court who decided that case that, when the ordinance contains no provision for any control or regulation of the business of handling, storing or selling beer and contains no reference to the maintenance of good order or safety of society, but merely levies a tax to aid the general revenue it is a revenue measure and not an exercise of the police power. (Record page 8). Therein he is correct. But he declares the ordinance in this case different from the Terre Haute ordinance, wherein he errs. (Record page 10.) The ordinance here is identical with the Terre Haute ordinance in its simple demand for revenue without a single syllable of *regulating* or *policing* language. The learned Judge erroneously and illogically assumes that, because police ordinances sometimes impose financial burdens, all impositions of financial burdens, *though confessedly for revenue only*, are referable to, and to be tested as an exercise of, the police power. Such a doctrine, carried to its logical conclusion, makes the levying of all occupation taxes an exercise of the police power and would justify many exactions, confessedly enacted for revenue only, which would be clearly unconstitutional when tested as an exercise of taxing power. So illogical a doctrine is opposed to the rulings of this Court.

Brennan vs. Titusville, 153 U. S., 289;
Pabst vs. Crenshaw, 198 U. S., 17.

The learned Judge, as will be later shown, also errs in applying the cases of American Steel & Wire Co. vs. Speed, 192 U. S., 500, and Kehrer vs. Stewart, 197, U. S., 60.

Record page 11.

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THE TAX IMPOSED BY THIS ORDINANCE IS AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE IN THIS CASE.

All the assignments of error and the case may well be determined by the one general question presented, viz.: Can the City of Mobile by an exercise of the *revenue* power, without any pretense that it is levied in the exercise of the police power, impose a tax upon the business of selling, in the original packages, beer imported from other States in such original packages?

We contend that such an attempt to impose a tax for revenue is unconstitutional as a burden on interstate commerce by a long and *unbroken* line of decisions of this honorable Court, and that the necessity for a decision upon this question now is caused by a misinterpretation by the Court below of some recent decisions of this Court.

It is the law as declared by numerous decisions of this Court that the business of buying and selling original packages of goods, traded in as commerce between the States, is not taxable by the States.

Lyng vs. Michigan, 135 U. S., 166.
Leisy vs. Hardin, 135 U. S., 100.
Austin vs. Tennessee, 179 U. S., 363-4.
N. & W. R. R. vs. Sims, 191 U. S., 449-50.

Beer in kegs is in the original packages.

Keith vs. State, 91 Ala., 2.
Lyng vs. Michigan, 135 U. S., 166.
Leisy vs. Hardin, 135 U. S., 100.
Austin vs. Tennessee, 179 U. S., 351.
Brown vs. Maryland, 12 Wheaton, 419.
Com. vs. Schollenberger, 171 U. S., 1.

And it makes no difference that the license or occupation tax is directed against individuals within the taxing State, who are themselves the owners of the goods as original interstate importers. So long as the goods remain in the original packages the business of selling them cannot be taxed before they are sold.

We contend that the right to order beer from breweries in other States and bring it here in kegs, constituted importing the same, and gave the interstate importers a right to sell the beer in the original package, free of any State or

municipal taxation on such business not exacted under the police power, and that, until said sale had taken place after importation and was an accomplished fact, the keg or kegs of beer forming the subject matter of the sale, did not become mingled with a mass of property in the State so that the *business of selling* same could be taxable therein.

Keith vs. State, 91 Ala., 6.

In the case of Schollenberger vs. Pennsylvania, 121 U. S., p. 22, a case of interstate importation, Mr. Justice Peckham quotes from Mr. Chief Justice Fuller in a prior case as follows:

"The case of Leisy vs. Hardin, 135 U. S., 100 (34; 128, 3 Inters. Com. Rep 36), went a step further than the Bowman case, and held that the importer had the right to sell in a State into which he brought the article from another State in the original package or kegs, unbroken and unopened, notwithstanding a statute of the State prohibiting the sale of such articles except for the purposes therein named and under a license from the State. Such a statute was held to be unconstitutional as repugnant to the clause of the Constitution granting power to Congress to regulate commerce with foreign nations and among the several States. Mr. Chief Justice Fuller, in speaking for the Court, said: 'Under our decisions in Bowman vs. Chicago & N. W. R. R. *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled with the common mass of property within the State. Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere by seizure or by any other action, in prohibition of importation and sale by the foreign or non-resident importer.'"

In the Schollenberger case this Court held that the sale of a ten pound package of oleomargarine in the original tub or bucket in which the same was packed was protected by the original package doctrine, even though the sale was by the importer to the consumer.

It results from this that the test question is whether the property was sold in the original package. If it was, it did not become mingled with the property in the State until after the sale, and it makes no difference to whom the sale might be made, whether to wholesaler, jobber, retailer or consumer. The test is *original package*, and that only.

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THE "WILSON" BILL.

In 1890 it was deemed wise by Congress to abdicate to the States the *police power* over all fermented, distilled or other intoxicating liquors. Accordingly, by Act of August 8, 1890, 26th U. S. Statutes, page 313, c. 728, commonly called the "Wilson Bill," it was provided as follows:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory *enacted in the exercise of its police powers*, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

3 Fed. Stat. Ann. 853.

This statute has been construed and its scope determined; its purpose is limited purely to give to the State *POLICE POWER and that alone*, over liquors which come under the head of interstate commerce.

3 Fed. Stat. Ann. 854.
Reyman B. Co. vs. Brister, 179 U. S., 455.
In re Rahrer, 140 U. S., 545.
Vance vs. Vandercook, 170 U. S., 438.
Pabst B. Co. vs. Terre Haute, 98 Fed., 330.
State vs. Bengsh, 170 Mo., 81; 70 SW., 710, 720.
F. Miller B. Co. vs. Stevens, 102 Iowa, 60; 71 NW., 186.
Stevens vs. State, 61 Ohio. St., 597; 56 NE., 178.
Tinker vs. State, 90 Ala., 640.

But the Act of Congress above quoted gives no right to levy a tax on the *business of dealing* in such liquors while the same retains its interstate-import character, *purely for purposes of revenue or taxation.* The police power cannot be put forward as an excuse for oppressive and unjust legislation, not under the police power.

Austin vs. Tennessee, 179 U. S., 349, citing Holden vs. Hardy, 169 U. S., 366, 392.
Pabst Brewing Co. vs. Terre Haute, 98 Fed., 330.

The ordinance of the City of Mobile of which the above quoted provisions are a part, is purely a revenue ordinance and is not a police ordinance in any respect.

Stratford vs. Montgomery, 110 Ala., 626.

Leloup vs. Mobile, 76 Ala., 401, 403, reversed by S. C., 127 U. S., 644.
Pabst Brewing Co. vs. Terre Haute, 98 Fed., 334.
Brennan vs. Titusville, 153 U. S., 289, 301-2.
Swords vs. Daigle, 32 So. Rep. ,94 (La.)

"Because a license may be required in the exercise of the police power it does not follow that every license rests for its validity upon such police power. A State may legitimately make a license for the privilege of doing a business one means of taxation, and that such was the purpose of this ordinance is obvious, not merely from the fact that in the title it is declared to be for 'general revenue purposes,' but also from the further fact that, so far as we are informed by any quotations from or references to any part of the ordinance, there is no provision for any supervision, control, or regulation of any business for which by the ordinance a license is required. In other words, so far as this record discloses, this ordinance sought simply to make the various classes of business named therein pay a certain tax for the general revenue of the city."

Brennan vs. Titusville, 153 U. S., 301-2.

The above quotation from the Brennan case applies with peculiar accuracy to the case at bar..

The City of Mobile has no power under its charter to enact any police regulations as applied to *wholesale* liquor dealers. The revenue power is given by Section 43 of its charter (Pamphlet Acts of 1901, page 2374, as follows:

"Sec. 43. Be it further enacted, That the said General Council shall besides the tax heretofore authorized have authority to assess and collect from all persons or corporations trading or carrying on any business, trade, or profession by an agent or otherwise within the limits of said corporation a license tax which shall be fixed and declared each year by ordinance of said corporation and the license so paid shall be issued and the amount imposed shall be collected as may be provided by ordinances of said corporation. * * * "

The "tax heretofore authorized" is the *ad valorem* property tax assessed and levied against the property within the municipality.

The grant of power to license and regulate certain classes of business *as an exercise of police power*, is given by Section 21 of the same charter (Acts 1901, page 2360), as follows:

"Sec. 21. Be it further enacted, That in order that its duties may be efficiently performed, said General Council shall have full power and authority to make and adopt and declare by-laws or ordinances not in conflict with the laws

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of this State or the United States, and the better to effectuate this, the chairman elected to preside over the meetings of the said General Council shall have authority to appoint from the members of the General Council committees upon all legislative questions and other matters as he may deem necessary, said committees to report the result of their consideration to the General Council, and the said by-laws or ordinances adopted and declared by the General Council as above provided shall have force and effect in said City of Mobile for and concerning the several matters mentioned in this section and therein to provide and declare such fines, penalties and forfeitures, imprisonment and hard labor within the limitations and restrictions hereinafter provided as they may deem appropriate, and any person or persons violating or disobeying such by-laws or ordinances may be punished therefor as provided in such by-laws or ordinances upon conviction thereof before said Recorder, who shall have jurisdiction and cognizance of such matters, that is to say, said General Council may make, ordain and declare such by-laws and ordinances for and concerning the prevention and removal of nuisances and the prevention and extinction of contagious and infectious diseases, and in giving effect to these powers they are to act in co-operation with the Board of Health and delegate to said Board such executive authority as the General Council and said Board of Health may mutually agree upon concerning the lighting of the streets, avenues and public places, the licensing and regulating of retail liquor dealers and of hackney coaches, carriages, wagons, hacks and drays, the regulation of pawn brokers, the restraint or prohibition of gambling, the regulation of theatrical and other entertainments and amusements, the establishment, regulation and management of markets, the construction, repair and regulation of sewers, pipes and appurtenances thereto, or thereunder. They may also make ordinances concerning rights of way and regulations of street cars, street railways and other railroads and their stations, the storing and handling of gunpowder, dynamite, oil and other inflammable and hazardous substances, the regulation of weights, and measures, and may establish and regulate magazines within or without the city and may own and regulate property inside or outside of its limits for magazines, pest houses, quarantine and other purposes, they may also make such other ordinances concerning the establishment and regulation of fire wards, fire companies, and fire departments, the establishment and regulation of fire limits, the sinking and repairing of wells, erection and repairing of pumps, the removal or pulling down of houses, fences and other structures, to prevent the spread of fire and to extinguish the same, the regulation of partition and other fences, and of partition and other walls, the prevention of

disorderly assemblies, and houses, and establishment and discontinuance and regulation of city cemeteries, whether within or without the city limits, the regulation of the burial of the dead therein, and the prohibition of such burial within the city limits or within two miles thereof except in such cemeteries; and the General Council may also pass such by-laws and ordinances as may require vagrancy, idleness, disorderly or dangerous and suspicious persons, all persons of evil life or ill fame and such as have no means of support, or are likely to become chargeable to the City of Mobile, or to Mobile County, as paupers, all persons found drunk in or about the streets or loitering in or about tippling houses or who can show no reasonable cause for not having an occupation or employment or business or who have no fixed place of residence or who cannot give a good account of themselves, all such as may be grossly indecent in language or behavior publicly in the streets and all prostitutes or such as lead a notoriously lewd or licentious course of life to leave the city or pay a fine not exceeding fifty dollars, and said General Council may provide upon their failure or refusal to pay such fine or leave the City for their condemnation to labor under the direction of said General Council for a limited time, not to exceed three calendar months, unless such bond and security shall be given sooner. * * * "

It will be noticed that the power is given to license and regulate RETAIL liquor dealers and some other classes of business, BUT NOWHERE IS IT GIVEN POLICE POWER TO REGULATE WHOLESALE LIQUOR DEALERS.

The City can not enact an ordinance not authorized by its charter.

Exparte Mayor of Anniston, 90 Ala., 516.
New Decatur vs. Berry, 90 Ala., 432.
Norris vs. Town of Oakman, 138 Ala., 411.
S. C., 35, So. Rep. 450.

So that if we attempt to construe the license tax here in question as an exercise of police power it would be beyond the powers of the municipality; viewing it as a purely revenue measure it is apparently within the charter powers but void as a burden on interstate commerce.

It was contended also that the City has police power to pass the ordinance in question by virtue of a "general welfare clause" in the charter. The answer to this is the City charter does not contain any "general welfare clause" and, if it did, it could not properly be interpreted to authorize taxation thereunder.

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15 A. & E. Enc. Law (1st Ed.), 1192.
Ex parte Burnett, 30 Ala., 461; 467-8.

The decision below, now sought to be reversed, was based in large part on the cases of

American Steel & Wire Co. vs. Speed, 192, U. S., 500.

Kehrer vs. Stewart, 197 U. S., 60.

I submit that when rightly interpreted, those cases are no authority in support of the decision below. In City of Mobile vs. Phillips, 146 Ala., 158; 40 So. Rep., 826, now sought to be reversed, the Supreme Court of Alabama squarely bases its opinion on these two cases, and yet it refuses to "undertake to analyze or harmonize them" when the effect thereof, in connection with other decisions of this Court, was discussed.

The case of American Steel & Wire Company vs. Speed, 192 U. S., 500, is not applicable to the present case. That case deals with a *property tax*, pure and simple, which is a local or State question, and not a Federal question.

The merchant's tax involved in the American Steel & Wire case, is merely a tax on capital invested in that State and a tax on such capital is a property tax and not a tax on the commerce.

Pullman P. C. Co. vs. Pa., 141 U. S., 25.

The City of Mobile claimed that the doctrine of the American Steel & Wire case is brand new and overruled many of the older decisions of this Court on this subject. But the doctrine of the American Steel & Wire case is not new, as the report in 192 U. S., 500, shows. That property, *as such*, was subject to *property taxation*, has been announced by this Court often; the following cases are cited by the American Steel & Wire case as authority therein:

Woodruff vs. Parham, 8 Wallace, 123 (1868).
Brown vs. Houston, 114 U. S., 622 (1885).
Emert vs. Mo., 156 U. S., 296 (1894).
Kelly vs. Rhodes, 188 U. S., 1 (1902).

Woodruff vs. Parham, 8 Wallace, 123, cited by the American Steel & Wire case, does not adequately show the nature of the tax passed on; the report in the Alabama Supreme Court (41 Ala., 335) which is thereby reviewed, shows it to be purely an *ad valorem property tax*. The decision in 41 Ala., 335, is based on the similar case of Hinson vs. Lott,

40 Ala., 335, likewise an *ad valorem* property tax.

Brown vs. Houston, 114 U. S., 622, cited by the American Steel & Wire case, is a tax on coal as property—an *ad valorem* tax upon property; see the interpretation of it in Emert vs. Mo., 156 U. S., 317.

Emert vs. Mo., 156 U. S., 296, cited by the American Steel & Wire case, was a case of a pedler's license; the law under consideration was enacted under the police power (page 311); many cases are reviewed and incidentally the statement of facts in the opinion (page 310 and 311) do not even remotely touch a question of original package or interstate commerce.

Kelly vs. Rhodes, 188 U. S., 1, cited by the American Steel & Wire case, dealt with an attempt by a State to tax a drove of 10,000 sheep, *as property* under the regular *ad valorem property tax*, while the sheep were being driven through the State from another State, *en route* to market in a third State. The opinion holds that property at rest for an indefinite time, either before, during or after interstate transportation, is liable to local taxation *as property*.

This Court recognizes the difference between a tax on the goods *as a property tax*, and a tax on the business of selling in original packages *as a tax on the commerce itself*.

Pullman P. C. C. vs. Pa., 141 U. S., 23.

The distinction between property taxes and occupation taxes is recognized as marked in the State of Alabama. The Alabama Supreme Court says:

"In this case, the tax is not on property, but on a different subject and species of taxation—a license or privilege tax, for doing business in the city. There is a marked distinction in our Constitution kept up in our revenue systems and recognized in the adjudged cases, between the two subjects of taxation—property as such, and a license or privilege tax."

City of Anniston vs. So. Ry. Co., 112 Ala., 565.
Goldsmith vs. Huntsville, 120 Ala., 184.

This distinction must be kept in mind, *and as Mr. Justice White* (speaking for the unanimous Court) *says in the American Steel & Wire case in* 192 *U. S., pages* 520-1, *the cases will be found not to be overruled.* Mr. Justice White also says therein that the cases of Lyng vs. Michigan and Leisy vs. Hardin, are distinguishable from and not overruled by the American Steel & Wire case.

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The State may tax goods *as property* by a non-discriminating property tax, though it may not tax them *as imports*, distinctively and discriminatingly as such, and *it may not tax the business of importing* the goods from another State and *selling them in original packages.*

It is axiomatic that the power of tax without limit is the power to destroy, and there is no power above the State to limit the extent of the State's power to tax, so long as the provisions of the United States Constitution as to equal rights to all are not violated.

Leisy and Hardin, 135 U. S., 100, decides that the State could not, under any power possessed by the States, prohibit the "interstate-importation" and sale in original packages of any commodity.

Lyng vs. Michigan, 135 U. S., 166, was a case where a dealer in beer in original packages imported from another State as in the case at bar, was prosecuted for non-payment of a revenue license. In its controlling principles the case was exactly like the case at bar and this Court held that conviction could not be sustained.

In the case of N. & W. R. R. vs. Sims, 191, U. S., 441, (decided at same term with American Steel & Wire case), Mr. Justice Brown, (who also delivered the unanimous opinion during the next term in the Kehrer case,) expressing the unanimous opinion of the Court, said on page 449:

"Upon the other hand, for the past seventy-five years and ever since the original case of Brown vs. Maryland, 12 Wheat., 419, 6 L. Ed., 678, we have uniformly held that States have no power to tax directly, or by license upon the importer, good imported from foreign countries *or other States*, while in their original packages, or before they have become commingled with the general property of the State and lost their distinctive character as imports. In that case a law of Maryland required importers to take out a license before they could be permitted to sell their imported goods. That was declared to be void not only as a tax upon imports, but as an infringement upon the power of Congress to regulate commerce. The case is one of the most important ever decided in this Court, and has been adhered to by a uniform series of decisions since that time."

Vance vs. Vandercook, 170, U. S., 348, was a case wherein Mr. Justice White, *who spoke for the Court in the American Steel & Wire case*, delivers the opinion of the Court and says on pages 444-5:

"It is also certain that the settled doctrine is that the power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any State regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the State."

Then in the case of American Express Co. vs. Iowa, 196 U. S., 133, Mr. Justice White speaks of the American Steel & Wire case as a *tax on merchandise*—a "general and undiscriminating tax on merchandise."

It would seem that, if the State had all the time the power to reach the *business of selling* interstate original packages of goods for purposes of taxation, it should also have the power to reach it for police purposes. Yet it did not.

Leisy vs. Hardin, 135 U. S., 100.

It was necessary to get the Wilson Bill passed to be able to reach it for police purposes.

By the Wilson Bill, Congress merely removes the impediment to the States reaching the interstate liquor *through the police power* and keeps in existence any other impediment to the State's interference with interstate commerce in original packages.

If the State can tax the business of selling property brought here from another State, what need is there in the opinion of this Court in

Reyman B. Co. vs. Brister, 179 U. S., 455,

of the discussion of the line of demarcation between police and revenue power? In that case the Court takes pains to distinguish between the police and revenue power, and says in terms unmistakable that if the license tax there discussed was a revenue measure it would be invalid; if a police measure it would be valid. Yet all that discussion would be superfluous if the power to tax the property was not limited to a *general undiscriminating tax on property as such*, but embraced the right to tax the *business of selling the property*.

Kehrer vs. Stewart, 197 U. S., 60, came to this Court from the Supreme Court of Georgia, which latter Court twice decided the case on two appeals before it came to this Court.

1st Appeal, 115 Ga., 184; 41 S. E., 680.
2nd Appeal, 117 Ga., 969; 44 S. E., 854.

The Kehrer case as first decided by the State Court,

115 Ga., 184; 41 S. E., 680,

construes the tax under discussion there to be a tax on the

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occupation of the agent as distinguished from the *business of the principal.* The Court said:

"In the first place, it is perfectly clear that the tax is not laid upon packing houses, but is laid upon 'agents of packing houses.'" * * *

"We think it is clearly evident from the general tax act of 1900 that the tax under consideration is a tax upon occupation or vocation, one to be paid for the right or privilege of engaging in such occupation or vocation; and the expressions 'doing business' and 'business is carried on' refer to the exercise of the vocation of a packing house agent." * *

"As the tax is laid upon 'agents of packing houses,' it is evident that, relative to this particular tax, the vocations referred to are the vocations of those who are required to pay the tax—that is 'agents of packing houses;' and that when such an agent does business for his principal in any county of this State he is carrying on in that county the vocation of a packing house agent. The agent of the packing house shall pay the tax 'at the time of commencing to do business.' It seems manifest that the word 'business' here refers to the business of the agent, and not that of the principal, for it is the agent, and not the principal, who shall pay the tax 'at the time of commencing to do business.' * * *

"The legislature has the right to classify, and it has classified. It has created a new class of occupations to be taxed, viz., 'agents of packing houses,' and has imposed an occupation tax upon all of that class."

The *Kehrer* case as decided by the State Court on the second appeal,

117 Ga., 969; 44 S. E., 854,

holds the construction put upon the act in question on the first appeal to be *res adjudicata* and adhered to its views expressed on the first appeal; on the second appeal it merely discussed the new points raised after the first appeal. On the second appeal the question of interstate commerce was considered.

The courts of that State recognize no distinction between a tax on *property as such* and a tax on the business selling such property. They affirm the validity of the occupation tax as a tax on property. The question of the validity of the tax on property *as such* is purely a State question, subject only to the Federal Constitutional limitation that it shall be non-discriminating.

This Court in its opinion in the Kehrer case does not decide for itself according to its own views that this obvious

occupation tax was a tax on *property as such*, but merely recites that the State Supreme Court and *both parties to the cause solemnly admit that it is a property tax.* This Court merely accepts that solemn admission as binding on the parties just as this Court considers itself bound by the decision of the State Court as to the validity of a State *property* tax where the Federal Constitutional limitation is not violated.

The cases cited by the *Kehrer* case on the second appeal

44 S. E. Rep., 117 Ga., 969,

show that the tax is held to be a property tax when they were discussing whether the tax was void as a burden on interstate commerce. The State Court cities as authorities relied upon, the cases of *Brown* vs. *Houston*, 114 U. S., 622, and *Emert* vs. *Mo.*, 156 U. S., 296, both of which have been commented on earlier in this brief. They also cite *Machine Co.* vs. *Gage*, 100 U. S., 676, where a license on sewing machine peddlers was sustained *as a property tax* because not discriminating against the goods of other States. The *Gage* case has this to say:

"A State cannot require a license to be taken out to sell foreign goods while remaining in the packages in which they were imported. Such a law is contrary to the provision of the Constitution of the United States touching the laying of imposts by a State, and to the commerce clause of that instrument. Brown vs. The State of Maryland, 12 Wheat., 419."

The last paragraph of the opinion in the *Gage* case pointedly adopts the State Court's opinion sustaining the tax *based on the goods and not on the vocation* and cites in conclusion four cases involving taxes on property as such. It cites among them the case of Welton vs. Mo., 91 U. S., 275, which was a property tax case where the tax was declared void, not because of the occupation of trading therein, but because the *goods* of another State were discriminated against.

Another obvious ground of distinction between the Kehrer case and the case at bar, is this: In the Kehrer case the domestic business upon which the license tax was sustained consisted of sales in Georgia of goods manufactured by Nelson Morris & Co. in Illinois and shipped *to themselves in Georgia for sale*, and no "*commerce*" of any kind was involved until the sales thereof in Georgia.

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To ship goods manufactured by one to the manufacturer himself in another State is not commerce at all, for one cannot traffic with himself. That is quite different from a case (as the one at bar) where a citizen of Alabama buys goods manufactured in Wisconsin by interstate contract and receives them by interstate transportation; the latter is a case of commerce of an interstate character, entitling the importer to sell the goods in the State of delivery in the original package without burden imposed by the State upon such commerce.

The Georgia case, second appeal, in a *syllabus by the Court* says "a tax on the privilege of selling goods is in effect a tax on the goods themselves."

That holding is not in accord with the Alabama decisions on the same point, which hold to the contrary.

City of Anniston vs. So. Ry. Co., 112 Ala., 565.
Goldsmith vs. Mayor of Huntsville, 120 Ala., 184.
S. C., 24, So. Rep., 509.

But that conflict does not affect the present case since each State determines for itself the validity of property taxes, no matter whether in form a property or occupation tax, and the State Court's determination is binding on this Court so long as it is not violative of the provisions of the United States Constitution prohibiting discrimination.

"A State may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a Court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States."

Connolly vs. Union Sewer Pipe Co., 184 U. S., 562-3.

No especial weight should be attached to the holding of the Alabama Supreme Court that Phillips, by reason of the acts shown by the agreed statements of facts in the case of City of Mobile vs. Phillips, 146 Ala., 158; 40 So. Rep., 826, "was carrying on an independent, domestic business, for which the City of Mobile has the right to require the prepayment of a license tax;" (Record page 36 of case No. 113.

"For whatever may be the divergent legal rules in the several States concerning the precise time when the liability of carrier as such in respect to the carriage of goods ends, they cannot affect the general principle as to when an interstate shipment ceases to be under the protection of the com-

merce clause of the Constitution, and thereby comes under the control of the State authority."

Adams Express Co. vs. Kentucky, 206 U. S., 137.

This Court has again recently recognized the distinction between property and privilege taxes. It was said by Mr. Justice Holmes, expressing the unanimous views of this Court,

"In other words, it was contended that the brooms, before they were sold, had become mingled with, or part of, the common mass of goods in the State, and so subject to the local law. *But the doctrine as to original packages primarily concerns the right to sell within the prohibiting or taxing State goods coming into it from outside.* * * * Some argument was made, to be sure, that even if the defendant was engaged in interstate commerce when he delivered the goods, still the ordinance bound him. American Steel & Wire Co. vs. Speed, 192 U. S., 500, 48 L. Ed., 538, 24 Sup. Ct. Rep. 365, was especially relied upon. But that decision did not modify the cases that we have cited. It dealt with a case where a mass of nails and iron wire was collected at Memphis from other States, by a manufacturer, for all purposes; some of the goods to be sold on the spot, some ultimately to be forwarded to purchasers in other States, but no package being consigned to or intended for any special customer, or free from the chance of being sold by a new bargain in Tennessee. *Under such circumstances the goods were liable to taxation in that State.* The distinction between that case and the present does not need further emphasis. In view of the many decisions upon the matter we deem further argument unnecessary to show that the judgment below was wrong."

Rearick vs. Pennsylvania, 203 U. S., 507.

and this Court there held void a city ordinance levying a license tax. That case seems to be authority for the case at bar.

Viewing the tax levy in the *Kehrer* or Georgia case, purely as a tax upon property, it is, of course, valid and sustainable.

Inasmuch as the form of the tax on property, *as property*, is entirely a State question, and not a Federal question, the decisions of the State Court *on property taxes* are accepted as final. In a great many of the Reports of this Court, this view is repeatedly asserted.

If the law of Alabama permitted the taxation of property as a property tax in the form of a license, the Georgia

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or Kehrer case would be followed in this case, but it does not so permit. The Alabama Constitution limits the taxes on property to a uniform *ad valorem* rate which may be fixed by the legislature, and while, in addition, the legislative body, under the revenue power, may levy taxes on occupations, this occupation tax is not considered a property tax at all, *but must stand or fall when viewed from the standpoint of occupation taxes as distinguished from property taxes.*

Goldsmith vs. Huntsville, 120 Ala., 184;
City of Anniston vs. So. Ry. Co., 112 Ala., 565.

The provision of the Alabama Constitution is as follows:

"Sec. 211. All taxes levied on property in this State shall be assessed in exact proportion to the value of such property, but no tax shall be assessed upon any debt for rent or hire of real or personal property, while owned by the landlord or hirer during the current year of such rental or hire, if such real or personal property be assessed its full value."

It is obvious that a flat privilege tax of $200.00 per annum for each dealer in keg beer in addition to *paid* licenses as wholesale liquor dealers, is neither a property tax nor "in exact proportion to the value of such property."

The City attorney, arguing for the affirmance of this case, cites the case of

Delamater vs. South Dakota, 205 U. S., 93;
S. C., 51 L. Ed., 724.

which is readily distinguishable from the cases at bar.

In the Delamater case the law construed was a *State statute*, not a municipal ordinance as in the case at bar. The State unquestionably possesses the power, since the enactment of the Wilson Law, to enact police measures concerning intoxicating liquors imported from other States; it could, *as a police measure*, levy a high license tax. The State Supreme Court decided the tax in the Delamater case to have been levied under the police power, *as a measure of regulation*, not taxation, and this Court is concluded by that. Not so in the case at bar. The Alabama Supreme Court did not consider the question whether it was a police measure. Inferentially they admit it is *not* a police measure and only a revenue measure by deciding that the business was an "in-

dependent, *domestic business*," taxable as such. (See City of Mobile vs. Phillips, 146 Ala., 158; Record page 36 of case No. 113.)

Unlike the Delamater case, the tax in the case at bar is levied under a City ordinance. The City has only such powers as have been delegated to it by its charter, and as above shown, it has no police power over *wholesale* liquor dealers, to which the license tax can be referred.

In its opinion in the Phillips case (Case No. 113, Record page 36, reported 146 Ala., 158, and 40 So. Rep., 826,) the Alabama Supreme Court does not in any wise interpret the tax under discussion as a property tax, since such a view would be in obvious conflict with the State Constitution and a large number of other decisions of the same Court; nor does it attempt to justify the tax under this municipal ordinance as an exercise of police power; it simply declares, in conflict with many decisions of this Court, that the business sought to be taxed is local and not interstate in character.

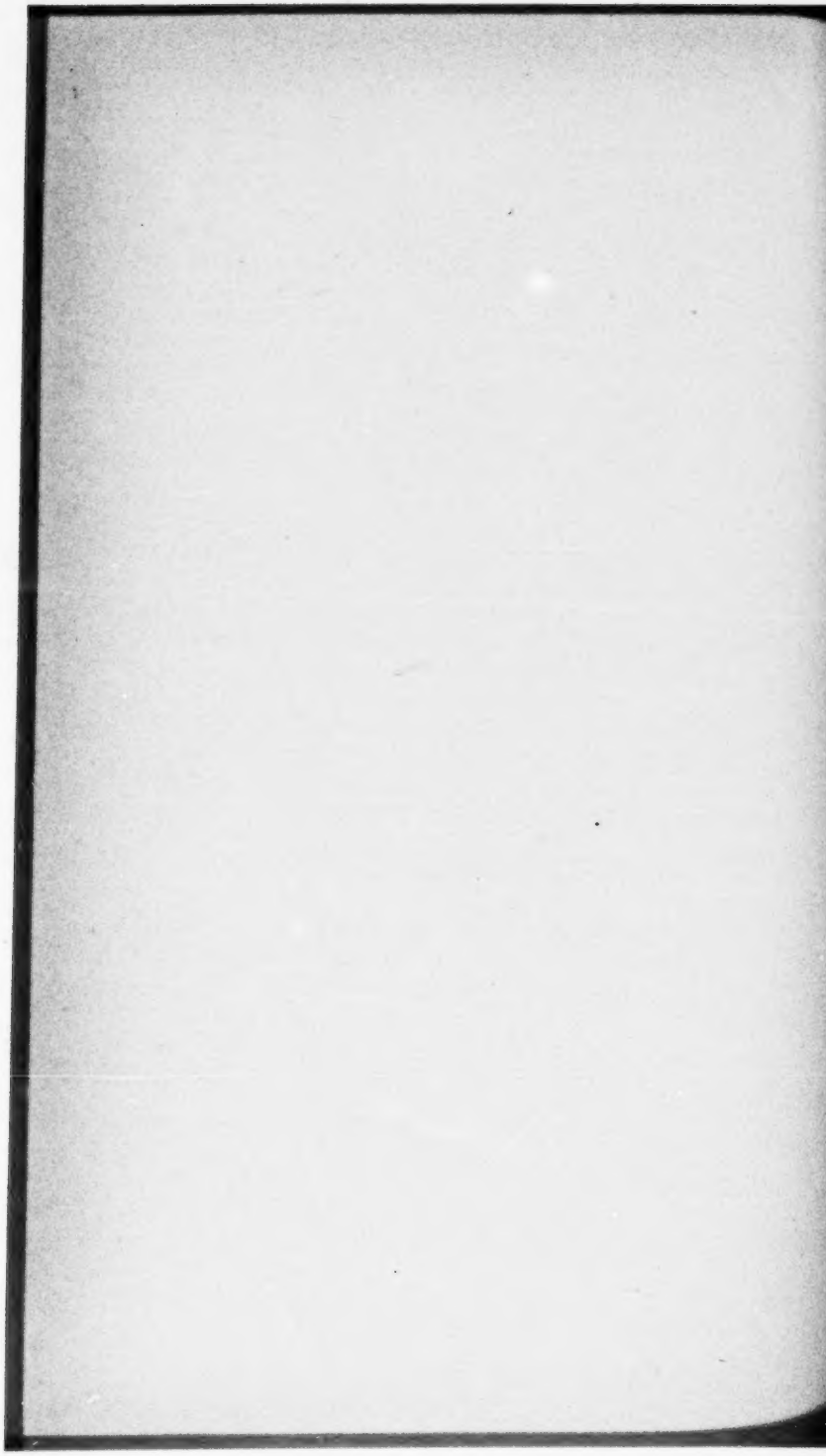
It is most respectfully submitted that therein the Alabama Supreme Court misapplies the recent decisions of this Court; that under a long and unbroken line of decisions of this Court, the license tax in question is unconstitutional and void, when applied to this case, and that the decision of the Court below should be reversed.

Respectfully submitted,

Walter A. White

Richard Wm. Stanley

Solicitors for appellants.



DEC 23 1907
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 112.

EDWARD L. RICHARD AND RALPH G. RICHARD, PARTNERS AS S. RICHARD & SONS, Appellants,

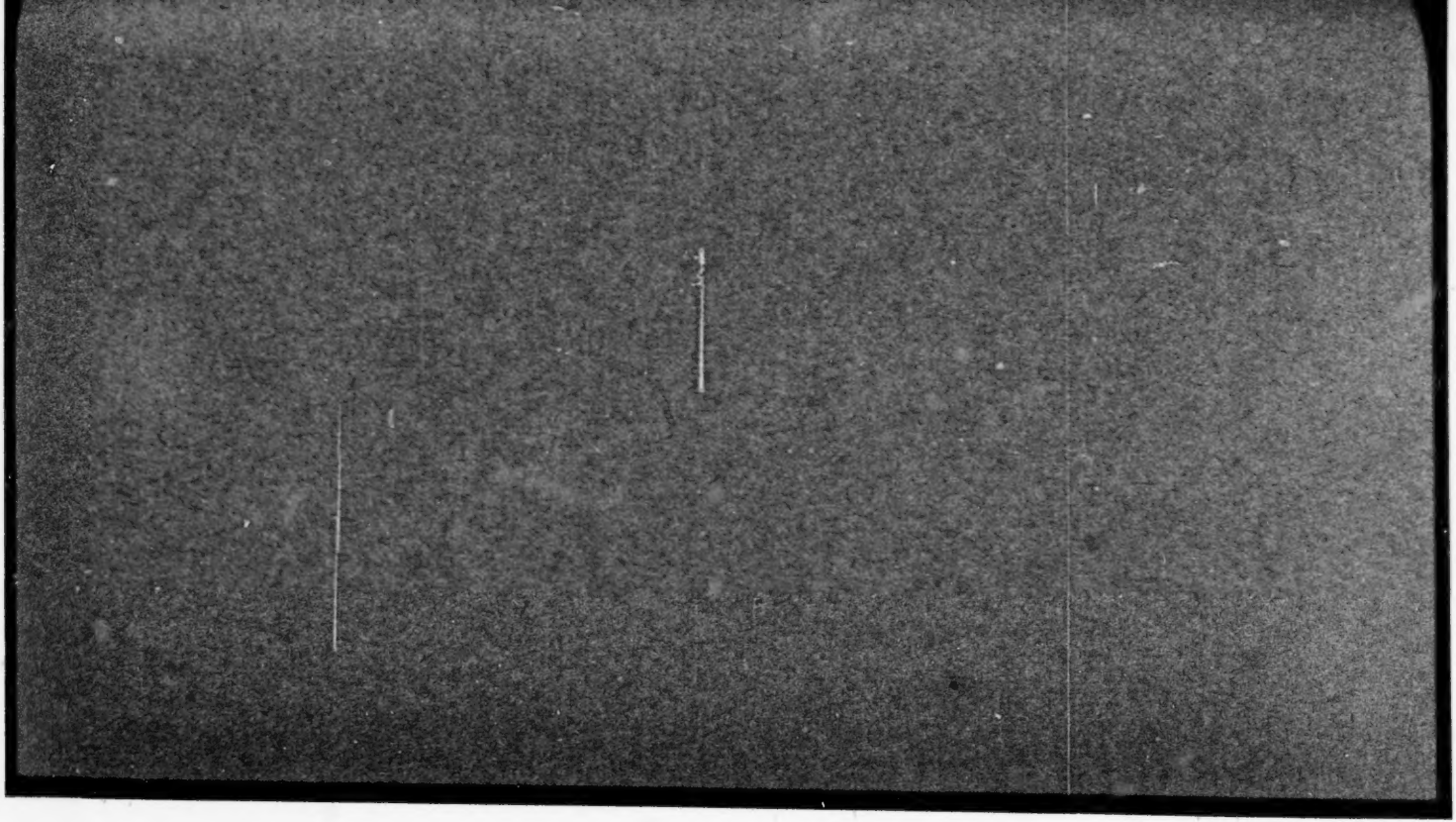
vs.

THE CITY OF MOBILE.

Appeal from the Circuit Court of the United States for the Southern District of Alabama.

Brief of BURWELL BOYKIN BOOTH for the City of Mobile.

PATTERSON PRINTING COMPANY.



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STATEMENT OF THE CASE.

The appellants filed a bill in the Circuit Court of the United States for the Southern District of Alabama, at Mobile, seeking to secure an injunction restraining said City of Mobile, its officers, agents, and servants from instituting proceedings at law or otherwise for the purpose of attempting the collection of a license tax from the appellants for doing business in said city as wholesale beer dealers.

In the bill of the appellants it is charged that the appellants and the city of Mobile are residents and citizens of the State of Alabama; that the appellants are engaged in the business of wholesale liquor dealers in the City of Mobile, and as such they have paid their license for carrying on said business of wholesale liquor dealers due to the City as such, and to the State and County, and have likewise complied with the requirements of law so far as such requirements are imposed by the laws of the United States. That as one part or feature of said wholesale liquor business the appellants are dealers in keg beer as wholesalers only, and under the following circumstances: That the appellants order beer by letters or telegrams sent from their place of business at Mobile, Alabama, to a brewery or brewing company owned and conducted outside of the State of Alabama, and that the beer so ordered is shipped pursuant to such orders by continuous interstate transportation by said non-resident brewer or brewing company to appellants at Mobile, Alabama, in kegs, which kegs are without other packing loaded into railroad freight cars and transported by the transportation companies from said breweries in such other States to appellants in Mobile, Alabama. That the purchase of such beer by the appellants are absolute and that by such purchases appellants become the owners thereof to do with as they please; that they pay for the same usually after the arrival of such beer in Mobile; that the packages in which the beer comes are invariably the wooden kegs of the ordinary, usual and customary commercial sizes in which the same is packed for sale and shipment, and that the same is taken by appellants or their servants in the same usual commercial original packages from the cars of the railroad company upon the arrival thereof at Mobile, and are stored in the storehouse or warehouse of appellants in the City of Mobile until sold by the appellants; that the

appellants make sales of such beer in quantities of one keg or more to their various customers in and about the City of Mobile, and the vicinity thereof, and that all such sales are made in contemplation by appellants of delivery by them of said kegs as original packages, out of their said storehouse or warehouse in the City of Mobile, and that such deliveries thereof are made by delivery wagons to their customers in such original packages; that from the time of the packing and shipping of said beer at the brewery or breweries in States other than Alabama, until after the sale and delivery thereof by the appellants to their various customers in and about Mobile, and the vicinity thereof none of said kegs ever become broken or opened until after the same are sold and delivered by appellants, and the deliveries by appellants pursuant to such sales are always and invariably in the same original, usual, commercial packages in which the same were packed and shipped from the brewery or breweries in said foreign State; that this mode of business has been conducted by the appellants ever since March 15th, 1904, and for some time prior thereto, and still continues, and that except as is hereinbefore stated the appellants neither as brewery, firm, person, corporation, dealer, brewer, brewery agent, or handler, has ever sold beer by the barrel, half barrel or quarter barrel in the City of Mobile, Alabama, since March 15th, 1904. That these facts are well known to the Mayor and other officers in the City of Mobile, charged with the duty of collecting the revenue of the City. That the City of Mobile is not authorized by its charter to enact any police regulations concerning the business of wholesale beer dealers and said City has not enacted any police regulations regulating or attempting to regulate specially the business of wholesale liquor or beer dealers.

That in the year 1904, and again in the year 1905,

and again in the year 1906, said City of Mobile through the law making body thereof did enact a general revenue ordinance for each such year, imposing and assessing upon persons, firms and corporations doing business in the City of Mobile and upon a large number of classes of such persons, firms and corporations certain license taxes for carrying on such business in the City of Mobile, and that among such licenses so assessed for each such year are the following:

Wholesale Liquor Dealers.—

Stock $2,000.00 and under.....$ 75.00
Stock $2,001.00 to $3,000.00 .....$100.00
Stock $3,001.00 and over $125.00

Note.—This clause does not include license for wholesale keg beer dealers, agents, brewers, breweries or handlers of wholesale keg beer.

Appellant then reiterate the statement that they have paid their licenses which they were required to pay under the subsection next above set out.

In the sixth paragraph of their bill the appellants charge that another paragraph or subsection of said general revenue ordinance was as follows:

"*Breweries.*—Each person, firm, corporation, dealer, brewer, brewery agent or handler for a brewery, selling beer by the barrel, half barrel or quarter barrel, this clause not to include license for wholesale or retail vinous or spirituous liquors .....$200.00"

That pursuant to the requirement of this last mentioned paragraph the City of Mobile demanded of the appellants a license tax of $200.00 for each of the following years, to-wit, 1904, 1905, 1906, for carrying on the business of a wholesale dealer in keg beer; that appellants were advised that under the facts hereinabove stated the business of dealing in wholesale keg beer carried on by

them is not taxable for revenue purposes by the State of Alabama or any municipal subdivision thereof, because the same is interstate commerce in original packages; that is to say, the said beer is acquired by the appellants through the acts of interstate commerce pursuant to which and in the contemplation of which they are entitled to sell the same in original packages after the arrival thereof in the City of Mobile in the State of Alabama without the payment of license or privilege taxes for the privilege of dealing in such keg beer; that notwithstanding these facts the City of Mobile, the defendant herein, has demanded said license taxes of $200.00 for each of said three years, 1904, 1905, 1906, and under a claim that appellants are committing a violation of said ordinance by refusing to pay these inequitable and unjust demands have caused the appellants to be arrested and brought before the Recorder of the City of Mobile, to be tried for an alleged violation of the city ordinance where, unless said City of Mobile is restrained, from further prosecution of said cause by the Circuit Court, the appellants may be subject to the infliction of a fine, or in the default of the payment of such fine to imprisonment or sentenced for the performance of hard labor by said Recorder, the Police Magistrate of the City of Mobile.

In the seventh paragraph of their bill the appellants aver that they have prepared at large expense to themselves a large refrigerator or cooler for the storage and safe keeping in proper condition of said keg beer so imported from other States and dealt in by appellants, and have prepared other equipment for the transaction of such business, which cooler and other equipment will be practically valueless to appellants if said business of wholesale dealers in keg beer is greatly interfered with or stopped as the result of said unjust prosecution for alleged violation of said ordinance. That the profits de-

rived by the appellants from said business are large, and constitute a material part of their business, and that the license taxes now claimed by said City of Mobile, together with the value of said equipment and cooler greatly exceed, exclusive of interest and costs, the sum of $2,000.00; and that the amount in controversy herein exceeds, exclusive of interest and costs $2,000.00.

That it is provided further by said license ordinance of the City of Mobile that any person, firm, or corporation who shall engage in any business, trade or profession, or keep any establishment, or do any business or any act for which a license is required by said ordinance without first having obtained such license shall under conviction for each day of such business, trade or profession, or such establishment is kept or carried on, and for each act so done without such license be fined not less than one nor more than one hundred dollars.

Appellants aver that the license officer of the City of Mobile who is the proper officer to enforce the payment of licenses and who had caused the arrest of the appellants, threatens that unless said license tax is paid that he will under instructions from the Mayor of said city, continue to repeat the arrest of appellants until said just demand is complied with; that if said threat is performed appellants will be caused large expenses for counsel fees in their defense, and great annoyance and loss of income and profits for which they would have no adequate remedy at law. That in addition the City of Mobile is threatening to bring suits at law for the collection of said license taxes so demanded and to levy upon the property of appellants for the satisfaction of said demand.

The City of Mobile demurred to the bill of appellants upon the ground: "Because the facts stated in the bill show that the business being transacted by the complainants is not interstate commerce and the defendant is not

prohibited by the Constitution of the United States from requiring the payment to it of a license tax by complainants for engaging in said business."

The City of Mobile also made a motion to dismiss the bill for want of equity. (Transcript page 6).

The Circuit Court by its decree of July 5th, 1906, sustained the demurrer to the bill, and also sustained the motion to dismiss the bill for want of equity, and dismissed the bill of the appellants.

Section 43 of the charter of the City of Mobile (Acts of Alabama 1900-1901, page 2342), is as follows: "Be it further enacted, That the said General Council "shall, *beside the tax heretofore authorized, have au-* "thority to assess and collect from all persons and corpor- "ations, trading or carrying on any business, trade or pro- "fession, by an agent or otherwise, within the limits of "said corporation, a license tax, which shall be fixed and "declared each year by ordinance of said corporation and "the license so paid shall be issued and the amount im- "posed shall be collected as may be provided by ordinances "of said corporation; provided, that not more than one "license under this act shall be assessed against or col- "lected from partners trading, or business done under a "firm name; provided, further, that no license shall be "exacted from any mechanic who employs no capital, but "conducts his trade solely by his own skill and attention "without the aid of employes. A vehicle license may be "imposed in addition to business license, provided that "said license shall apply only to vehicles used in the trans- "portation of goods or merchandise, and vehicles used for "hire at the public stands. Said General Council may also "by ordinance impose such fines and penalties within the "limitations named in this act as they may deem advisable "for the doing of any business or the carrying on of any "trade, or the practicing of any profession by any parties

who shall fail to take out such license that may be im- "posed by said General Council under the authority con- "ferred by this act; in addition to the license tax imposed "upon livery stables there shall be an additional license tax "not exceeding one dollar for every carriage and 50 cents "for every buggy owned and used for hire by such livery "stables; except also that for all variety houses and other "places where songs and music or dancing are exhibited, "and wines or vinous, malt or spirituous liquors are sold "there may be a license tax to an amount not less than one "hundred and fifty dollars, nor more than one thousand "dollars, except also that for every circus, with or with- "out a menagerie, there may be a license tax imposed per "day not to exceed one hundred dollars. But no license of "any kind shall be granted except to respectable people "and for lawful business. *And the Mayor shall upon satisfactory proof revoke all licenses found to be otherwise, and also where the business is conducted in a disorderly manner or disorder is permitted in or about the premises licensed.*"

ARGUMENT.

It has been said that there is nothing new under the sun; that we go on from one generation to another learning over again the things which had been known in the past. We have in this case an illustration of the wisdom of the saying. In 1867 Woodruff and Parker brought suit to recover from Parham, the tax collector of the City of Mobile damages for wrongfully taking their goods upon their default in making payment of certain taxes due the City of Mobile; said taxes being levied upon the gross sales of certain goods brought to the City of Mobile by Woodruff and Parker from the States of New York, Massachusetts, Pennsylvania, Ohio, Missouri, Georgia and

Louisiana and sold by them in the original packages; there was judgment against Woodruff and Parker in the Circuit Court of Mobile County and they appealed the case to the Supreme Court of Alabama, where the case was determined and reported in 41 Alabama, 334. Chief Justice A. J. Walker for the Court said:

"In this case the constitutional power of a municipal corporation to tax the sales of articles brought into this State from other States of the Union, when sold in the form, bulk, and packages in which they were brought in, is involved. The appellant claimed in the Court below, as he does in this Court, a right of exemption from such tax, under the second paragraph of the tenth section of the first article of the Constitution of the United States. He further claims here, as he did in the Court below, that the law, or ordinance, under which said tax was levied, contravenes the constitutional provision above stated. The question of exemption from taxation claimed, and of the constitutionality of the law or ordinance under which the tax was levied, arose in the Court below, and was decided against the appellant. Upon the authority of our decision in Hinson vs. Lott (40 Alabama, 123), we decide, that the appellant has not the right of exception from taxation claimed; and that the law, or ordinance, under which the tax upon sales in the original package and bulk of articles brought into this State from other States, was levied, does not contravene the Constitution of the United States; and we affirm the judgment of the Court below."

Woodruff and Parker not content with the decision of the Supreme Court of Alabama, sued out a writ of error to this Court, where the decision was affirmed. Mr. Justice Miller for the Court said (8 Wallace, 137): "The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have

his millions employed in trade for half a lifetime and escape all State, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

"These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are NOT exempt from taxation, even under the limited circumstances laid down in the case of Brown vs. Maryland, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible."

Mr. Justice Miller continuing (page 139) said: "We "are satisfied that the question, as a distinct proposition "necessary to be decided, is before the Court now for the "first time. But, we may be asked, is there no limit to "the power of the States to tax the produce of their sister "States brought within their borders? And can they so "tax them as to drive them out or altogether prevent their "introduction or their transit over their territory?

"The case before us is a simple tax on sales or mer-"chandise, imposed alike upon all sales made in Mobile, "whether the sales be made by a citizen of Alabama, or of "another State, and whether the goods sold are the pro-"duce of that State or some other. There is no attempt "to discriminate injuriously against the products of other "States or the rights of their citizens, and the case is not,

"therefore, an attempt to fetter commerce among the "States, or to deprive the citizens of other States of any "privilege or immunity possessed by citizens of Ala- "bama."

The decision in Woodruff and Parker vs. Parham was made at the December term 1868, of this Court.

On February 23rd, 1904, this Court decided the case of the American Steel & Wire Company vs. Speed, 192 U. S., 500, Mr. Justice White delivering the opinion of this Court, and in the course of which it is said (page 519): "Assuming that the goods concerning which the State taxes were levied were in the original packages and had not been sold, if the bringing of the goods into Tennessee from another State constituted an importation, in the constitutional signification of that word, it is clear they could not be directly taxed. But the goods not having been brought from abroad, they were not imported in the legal sense, and were subject to State taxation after they had reached their destination and whilst held in the State for sale. This is as conclusively foreclosed by the decisions of this Court as is the doctrine resting upon the decision in Brown vs. Maryland, Woodruff vs. Parham, 8 Wallace, 123, Brown vs. Houston, 114 United States, 622. The doctrine upon which the cases rest was this, that imports, in the constitutional sense, embrace only goods brought from a foreign country, and consequently do not include merchandise shipped from one State to another. The several States, therefore, not being controlled as to such merchandise by the prohibition against the taxation of imports, it was held that the States had the power, after the goods had reached their destination and were held for sale, to tax them, without discrimination, like other property situate within the State.

"These two cases decided, the one more than thirty-

five and the other more than eighteen years ago, are decisive of every contention urged on this record depending upon the import and the commerce clause of the Constitution of the United States. The doctrine which the two cases announced has never since been questioned. It has become the basis of taxing power exerted for years, by all the States of the Union. The cases themselves have been approvingly referred to in decisions in this Court too numerous to be cited, and we therefore content ourselves by mentioning two of the cases where the doctrine was restated. Emert vs. Missouri, 156 U. S., 296; Kelly vs. Rhoads, 188 U. S., 1."

It will be observed that the license ordinance now brought in question makes no distinction between residents of the State of Alabama and non-residents, nor does it discriminate between breweries in the State of Alabama and in the City of Mobile, and breweries in other States than Alabama. The bill shows that when the beer was bought in kegs outside of the State of Alabama it became the property of the appellants; that the beer was bought for the purpose of being sold, was delivered to the appellants by the railroad company and was stored in their large refrigerator or cooler (Transcript page 3 near bottom) in their storehouse or warehouse, (Transcript page 2 near top) and then sold from there to various customers throughout the city of Mobile and delivered to such customers by means of wagons. Obviously the business as conducted by the appellants within the City of Mobile was domestic business. In carrying on the business the appellants did so in the same manner and was not distinguishable from the local breweries in Mobile.

The decision of this Court in the case of Kehrer vs. Stewart, 197, U. S., page 60, seems clearly against the contention of the appellants, that they were engaged in business protected from the imposition of a license by the

commerce clause of the Federal Constitution. In that case Mr. Justice Brown for this Court said: "In carrying on the domestic business, petitioner was indistinguishable from the ordinary butcher, who slaughters cattle and sells their carcasses, and in principle it made no difference that the cattle were slaughtered in Chicago and their carcasses sent to Atlanta for sale and consumption in the ordinary course of trade. Upon their arrival there they became a part of the taxable property of the State. It made no difference whence they came and to whom they were ultimately sold, or whether the domestic and interstate business were carried on in the same or different buildings." The carcass of an animal shipped for food from one State to another is an original package just as much as beer enclosed in a keg and shipped from one State to another is an original package, hence we cannot see in principle why the food product should be held to be liable to the license and the article of drink not.

In the case of Pabst Brewing Company vs. Crenshaw, 198 United States, at page 30, Mr. Justice White for this Court said: "The manifest purpose of the act of "Congress was to subject original packages to the regu- "lations and restraints imposed by the State law. If the "purpose of the act had been to allow the State law to "govern the sale of the original package only where the "sale of all liquor had been forbidden, this object could "have found ready expression, whilst, on the contrary, "the entire context of the act manifests the purpose of "Congress to give to the respective States full legislative "authority, both for the purpose of prohibition, as well as "for that of regulation and restriction with reference to "the sale in original packages of intoxicating liquors "brought in from other States."

In Delamater vs. South Dakota, 205 United States, at page 98, Mr. Justice White for this Court said: "It is

"settled by a line of decisions of this Court, noted in the "margin, that the purpose of the Wilson act, as a regula- "tion by Congress of interstate commerce, was to allow "the States, as to intoxicating liquors, when the subject "of such commerce, to exert ampler power than could "have been exercised before the enactment of the statute. "In other words, that Congress, sedulous to prevent its "exclusive right to regulate commerce from interfering "with the power of the States over intoxicating liquor, "by the Wilson act adopted a special rule enabling the "States to extend their authority as to such liquor shipped "from other States before it became commingled with "the mass of other property in the State by a sale in the "original package."

Appellants contend that the City of Mobile has no authority to regulate the sale of beer stored in their warehouse in said city in the original packages, and yet this Court held in the case of Delamater vs. South Dakota, 205 United States, 93, that a State may prohibit the carrying on within its borders of the business of soliciting orders for intoxicating liquor although such orders may only contemplate a contract resulting from final acceptance in another State. In the last case cited this Court said, page 99: "That act, as we have seen, manifested the con- "viction of Congress that control by the States over the "traffic of dealing in liquor was of such importance that "it was wise to adopt a special regulation of interstate "commerce on the subject. When, then, for the carrying "out of this purpose the regulation expressly provided "that intoxicating liquors coming into a State should be "as completely under the control of a State as if the liquor "had been manufactured therein, it would be, we think, a "disregard of the purposes of Congress to hold that the "owner of intoxicating liquors in one State can, by virtue "of the commerce clause, go himself or send his agent into

"such other State, there in defiance of the law of the "State, to carry on the business of soliciting proposals "for the purchase of intoxicating liquors."

Appellants also contend that the license imposed was not a police regulation but was enacted to raise revenue and for no other purpose. We insist that the Supreme Court of Alabama in this case, 146 Alabama, page 158, (Transcript page 36), held that the license imposed was a business or privilege license. Chief Justice Weakley for the Supreme Court of Alabama, said: "It is contended "for appellee that section 43 of the charter of Mobile "(Acts of Alabama 1901, page 2342 et seq.) operates to "exempt him from taking out a license for selling beer "by the barrel, etc., because he had already obtained a "a license as a retail beer dealer. We think there is no "merit in this contention. The section of the charter "relied on provided 'that not more than one license under " 'this act shall be assessed against or collected from part- " 'ners trading or business done under a firm name.' Ap- "pellee was enjoying two separate privileges, and unless "some other valid reason may be found to exempt him, "should procure a license for each. The section quoted "was intended merely to authorize a partnership or firm "business, in which several persons are interested, to be "conducted upon payment of one license."

The charter of the City of Mobile it has been shown provides: "That the said General Council *shall besides "the tax heretofore authorized have authority to assess "and collect from all persons or corporations trading or "carrying on any business, trade, or profession by an agent or otherwise within the limits of said corporation a license tax which shall be fixed and declared each year by ordinance of said corporation.*"

The Supreme Court of Alabama in the case of Van

Hook vs. Selma, 70 Alabama, 363, construing a similar section of the charter of Selma, said: "The right here conferred is, to regulate and license for police purposes merely; and the power to license for the purpose of revenue is not to be inferred. It is, indeed, excluded by the clearest implication."

In the case of Beer Company vs. Massachusetts, 97 United States, page 33, it is said, "Whatever differences "of opinion may exist as to the extent and boundaries of "the police power, and however difficult it may be to "render a satisfactory definition of it, there seems to be "no doubt that it does extend to the protection of the lives, "health and property of the citizens, and to the preserva- "tion of good order and the public morals. The legisla- "ture cannot, by any contract, divest itself of the power to "provide for these objects. They belong emphatically to "that class of objects which demand the application of the "maxim, *salus populi suprema lex;* and they are to be at- "tained and provided for by such appropriate means as "the legislative discretion may devise.

"In Mugler vs. Kansas, 123 U. S., page 658, Mr. Jus- "tice Harlan quotes from the opinion of Mr. Justice Grier "in the licenses cases, 5 Howard, 504, as follows: 'The true " 'question presented by these cases, and one which I am " 'not disposed to evade, is whether the States have a " 'right to prohibit the sale and consumption of an ar- " 'ticle of commerce which they believe to be pernicious " 'in its effects, and the cause of disease, pauperism, and " 'crime. Without attempting to define what are the pe- " 'culiar subjects or limits of this power, it may be safely " 'affirmed, that every law for the restraint and punish- " 'ment of crime, for the preservation of the public peace, " 'health, and morals must come within this category. " 'It is not necessary, for the sake of justifying the State " 'legislation now under consideration, to array the ap-

" 'palling statistics of misery, pauperism, and crime,
" 'which have their origin in the use or abuse of ardent
" 'spirits. The police power, which is exclusively in
" 'the States, is alone competent to the correction of these
" 'great evils and all measures of restraint or prohibition
" 'necessary to effect the purpose are within the scope of
" 'that authority.' "

But as said by the Circuit Court in its opinion in this cause:

"I may add that, irrespective of the Wilson act and "the question of police regulations hereinabove discussed, "I am of the opinion that the rule announced in the case "of the American Steel and Iron Company vs. Speed, 192 "United States, 500, would require a decision here in "favor of the City of Mobile. The Court here holds that "goods bought from another State and not from a foreign "country are subject to State taxation after reaching their "destination and whilst held in the State in the original "packages. Kehrer vs. Stewart, 197 U. S.., 60."

That license laws are regarded as police regulations we call the attention of the Court to the cases of Ex parte Marshall, 64 Ala., 267; Goldsmith vs. Huntsville, 120 Ala., 182; Toll vs. Hudson, 78 Missouri, 302; Pabst Brewing Company vs. Crenshaw, 120 Fed. Rep., 144; City of Little Rock vs. Barton, 33 Arkansas, 433; State vs. Ludington, 33 Wisconsin, 197.

We feel confident that the decree of the Circuit Court was correct and that it should be affirmed.

Respectfully submitted,

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